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**Big Ridge, Inc. and United Mine Workers of America.**  
Cases 14–CA–030379, 14–CA–030406, and 14–RC–012824

December 16, 2014

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND SCHIFFER

On August 31, 2012, the Board issued a Decision, Order, and Certification of Representative in this proceeding, which is reported at 358 NLRB No. 114. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Seventh Circuit, and the General Counsel filed a cross-application for enforcement.<sup>1</sup>

At the time of the Decision, Order, and Certification of Representative, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Recognizing that under the Supreme Court’s decision the Board panel deciding the instant case was not properly constituted, the Board, on July 1, 2014, moved the Seventh Circuit to vacate the Board’s order and promptly remand the case to the Board for consideration by a properly constituted Board panel.

On July 2, 2014, the Seventh Circuit issued a Final Judgment granting the petition for review, vacating the Board’s order, and denying the cross-petition for enforcement. In an accompanying order, the court explained that it did so on the basis that “‘in the absence of a lawfully appointed quorum, the Board cannot exercise its powers.’” *Big Ridge, Inc. v. NLRB*, 561 F. Appx. 563 (7th Cir. 2014) (quoting *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2557 (2014)). Thereafter, the court denied without comment the Board’s motion to remand. On September 10, 2014, the court issued a certified copy of the July 2 Final Judgment as mandate, thereby closing the court case. *Big Ridge, Inc. v. NLRB*, Case Nos. 12–3120, 12–3258 (7th Cir. Sept. 10, 2014), File No. 6604619.

By letter dated October 27, 2014, the Executive Secretary notified the parties that, in view of the determination that the Board panel that had previously decided the case

was not properly constituted, the Board would now “consider anew the Company’s exceptions, based on the full record, and [would] issue a decision and order resolving the allegations in the unfair labor practice complaint.” By letter dated October 31, 2014, the Respondent contends that, because the court denied the Board’s motion to remand, the Board lacks jurisdiction to reconsider this case.

The threshold issue is whether, in light of the denial of enforcement, the Board can consider this case anew. The sole basis for the denial of enforcement was that under the Supreme Court’s decision in *Noel Canning*, the January 2012 appointments to the Board were invalid, and the Board thus lacked a quorum when it issued its order in this case. See *Big Ridge, Inc.*, supra, 561 F. Appx. 563. The court’s denial of enforcement was not based on the merits of the unfair labor practice findings. The clear import of the court’s denial of enforcement, along with the Supreme Court’s *Noel Canning* decision, is that no validly constituted Board has ruled on the exceptions to the administrative law judge’s decision, recommended order, and certification of representative. The exceptions therefore are still pending before the Board, and the Board is free to address them.

Consideration of the case at this time is consistent with the treatment in the courts of appeals of other cases in which enforcement was denied for lack of a Board quorum at the time the original decision was issued, and the Board then considered the case anew and issued a new decision. The issue was presented squarely in *NLRB v. Whitesell Corp.*, 638 F.3d 883 (8th Cir. 2011). The court had denied enforcement of the Board’s original order because the Board had lacked a quorum under *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 687–688 (2010), and the Board issued a new decision and order. The court enforced the new order, rejecting the respondent’s argument that the Board lacked jurisdiction to decide the case anew:

In the prior action, the only question presented was whether to enforce the NLRB’s order. Relying on the *New Process* decision, we denied the application for enforcement because the prior NLRB decision, reached while there were only two members of the Board, was invalid. On that issue, our decision is final. See 29 U.S.C. § 160(e).

We have yet to determine whether Whitesell violated the NLRA. Our prior denial does not preclude the Board, now properly constituted, from considering this matter anew and issuing its first valid decision. . . . The Board properly read our denial of the application for enforcement as based solely on the *New Process* deci-

<sup>1</sup> The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

sion. We now address the merits of the Board's decision for the first time.

638 F.3d at 889. Similarly, in *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011), the court addressed the merits of a Board decision readdressing a case in which it had denied enforcement of a prior decision based on *New Process Steel*. See *NLRB v. Domsey Trading Corp.*, 383 F. Appx. 46 (2d Cir. 2010); *NLRB v. Domsey Trading Corp.*, 636 F.3d at 34 fn. 1.

We do not find the Seventh Circuit's denial of the Board's motion to remand after it had issued its Final Judgment to preclude our consideration of the case. See *Whitesell*, 638 F.3d at 888–889 (court's denial of Board's motion for remand or clarification of the initial denial of enforcement did not preclude consideration of case by properly constituted panel). As courts have explained, no inferential weight should be ascribed to summary denials of postjudgment motions for rehearing or clarification, given the myriad reasons the denials could represent. See, e.g., *Exxon Chemical Patents v. Lubrizol Corp.*, 137 F.3d 1475, 1479–1480 (Fed. Cir. 1998) (motion for clarification); *U.S. v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (petition for rehearing or modification); *Luckey v. Miller*, 929 F.2d 618, 621–622 (11th Cir. 1991) (petition for rehearing en banc).

Having determined that we have jurisdiction to resolve the merits of the complaint allegations, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision, Order, and Certification of Representative, and we agree with the rationale set forth therein.<sup>2</sup> Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision, Order, and Certification of Representative reported at 358 NLRB No. 114, which is incorporated herein by reference.<sup>3</sup> The judge's recommended Order, as further modified herein, is set forth in full below.

<sup>2</sup> By Order dated October 14, 2014, the Acting Regional Director for Region 14 revoked the Certification of Representative issued August 31, 2012, to the United Mine Workers of America based on the Union's disclaimer of interest. We therefore conclude that the issues raised by the Respondent's exceptions to the judge's overruling of its election objections and to the validity of the Certification of Representative previously issued in Case 14–RC–012824 are now moot.

<sup>3</sup> In the prior Decision, Order, and Certification of Representative, the Board noted that it was then considering the propriety of routinely requiring tax compensation and Social Security reporting remedies in connection with backpay. The Board has since concluded that these remedies should routinely be required where backpay is ordered. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). Therefore, we shall modify the judge's recommended Order and substitute a new notice in accordance with that decision. We shall further

## ORDER

The Respondent, Big Ridge, Inc., Equality, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening mine closure, job loss, or other unspecified reprisals if employees support the United Mine Workers of America (the Union).

(b) Promising employees benefits if they oppose the Union.

(c) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Wade Waller full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Wade Waller whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Compensate Wade Waller for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for Wade Waller.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Wade Waller, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Equality, Illinois facility copies of the attached notice

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modify the notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2014

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Kent Y. Hirozawa, Member

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Harry I. Johnson, III, Member

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Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with mine closure, job loss, or other unspecified reprisals if you support the United Mine Workers of America (the Union).

WE WILL NOT promise you benefits if you oppose the Union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Wade Waller full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Wade Waller whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Wade Waller for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Wade Waller, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

BIG RIDGE, INC.

The Board's decision can be found at [www.nlr.gov/case/14-CA-030379](http://www.nlr.gov/case/14-CA-030379) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

